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**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)	
)	
Implementation of Sections of the)	
Cable Television Consumer Protection)	MM Docket No. 92-266
and Competition Act of 1992:)	
)	
Leased Commercial Access)	CS Docket No. 96-60

COMMENTS OF ENCORE MEDIA CORPORATION

Encore Media Corporation ("Encore") submits these comments in response to the Commission's Further Notice of Proposed Rulemaking in this proceeding. The Commission's proposals to overhaul its leased access rules are likely to have the unintended consequence of requiring widespread deletions of existing programming services and decreasing the diversity of programming now available to viewers.

The 1992 Cable Act Amendments expanded the purpose of leased access to include "the promotion of competition in the delivery of diverse sources of video programming." 47 U.S.C. §532(a). The Commission's proposals, which include subsidized leased access pricing and mandatory preferential packaging, appear to so tilt the playing field in favor of leased access programmers as to decrease substantially competition among programmers. While recognizing the Congressional mandate for leased access, Encore, as a provider of multiple

premium services,¹ is vitally interested in preserving fair competition for channel capacity and packaging opportunities.

The Commission's proposals must be evaluated in the context of the existing shortage of channel capacity, which the Commission has acknowledged. Second Annual Report, CS Docket No. 95-61, FCC 95-491 (rel. Dec. 11, 1995), at ¶17. At the same time, the number of cable programming services competing for such capacity has continued to expand rapidly (id. at ¶19), and numerous new network launches are planned. E.g., "Rookies and Wanna-bes: The New Cable Networks," Broadcasting & Cable, Apr. 29, 1996, at 64. Faced with this shortage of channel capacity, cable operators generally have launched other channels on "unused" leased access channels so that any significant increase in leased access will require deletions of existing channels and result in subscriber dissatisfaction. Thus, a revised "maximum rate formula" that yields subsidized leased access rates would cause substantial disruption in the carriage of and marketplace for existing programming services.

A. The Commission's "Opportunity Cost" Method Understates the Value of Channel Capacity.

The Commission's proposal to calculate a narrowly-defined "opportunity cost" for deleting specifically-designated channels for leased access will not yield a realistic measure of the value of such channel capacity to cable operators or programmers. By limiting the leased access charge to the revenue lost from the dropped channel (and any lost advertising revenue,

¹ Encore provides the following channels of commercial-free premium programming services to multi-channel video programming distributors: "ENCORE," its "Thematic Multiplex" channels (Love Stories-encore 2, Westerns-encore 3, Mystery-encore 4, Action-encore 5, True Stories & Drama-encore 6, and WAM! America's Kidz Network-encore 7); and its "First Run Multiplex," "STARZ!-encore 8." Encore also provides several additional formats and/or multiplexes of these premium services.

which will be minimal for newly-launched channels) and then requiring carriage of the leased access channel on a system's basic or most widely-distributed cable programming services tier ("CPST"), the Commission has constructed a formula which will yield a leased access charge of little or nothing for most programming services carried on regulated tiers. Instead, the cable operator, providers of other programming services on such tiers, and subscribers will subsidize the cost of leased access. This result intuitively suggests that the Commission's fundamental valuation approach is misguided.

Encore respectfully submits that the Commission should consider more than the present revenue stream from the individual channels to be deleted. At a minimum, the revenue for all channels used to deliver the kinds of programming on a deleted channel (e.g. premium channels, tiered services with advertising, or home shopping channels) should be considered. To do otherwise would seriously understate the value of channel capacity because the channels which cable operators are likely to delete will be those channels launched most recently. For premium services, increasing penetration is a continuous process over a multi-year period. Consequently, more recently-launched premium services, such as ENCORE or STARZ!-encore 8, will not have had an opportunity to build penetration to the levels achieved by previously-launched services, such as HBO, and to maximize the resulting cash flow. The channel capacity, however, is no less valuable during the interim. Thus, the Commission's channel-by-channel valuation approach, limited to averaging the channels being deleted, will understate the value of channel capacity.

The Commission's valuation approach also does "not explicitly include revenue lost because of a purported loss in subscribership to a particular tier because particular programming is dropped." Further Notice at 86. Although this measure of value may be

difficult to quantify, it is a critical and increasingly important element of the value of channel capacity. Encore has pursued an alternative premium programming strategy to offer lower-priced and better-value premium services. An essential element of that strategy is to increase the penetration of popular packages of premium programming to “never pays” and “former pays,” i.e. basic subscribers who have never subscribed to premium services or who did so in the past and subsequently dropped them. To value the channels used to distribute Encore’s services simply by multiplying the number of subscribers by the net revenue per subscriber (focusing solely on the lower per-subscriber margin) would ignore Encore’s fundamental programming and marketing philosophy and grossly understate the value of those channels. Although it may be difficult to quantify such value, the Commission cannot ignore it and must develop some form of regulatory proxy to substitute for this significant “opportunity cost.”

Similarly, Encore is convinced that subscribers value “dependable viewing destinations.” Consequently, Encore has structured its programming offerings, particularly its Thematic Multiplex services, based on the most popular programming themes which it identified through viewer surveys. To measure simply the revenue lost from eliminating a channel of the Thematic Multiplex clearly does not capture the loss to the complete programming package, which no longer offers the full complement of theme or mood destinations. This same kind of value is lost when the Commission requires cable operators to delete programming services from structured tiers and to substitute leased access services over which the cable operator has no editorial discretion, particularly if the Commission were to mandate the packaging of such services.

Finally, the Commission questions whether it should require “preferential” leased access pricing for “not-for-profit entities,” i.e. further reduced maximum lease rates for non-

profit programmers. Encore respectfully submits that the legislative history which the Commission cites to support such preferential pricing only suggests that cable operators should be authorized to offer lower prices to non-profit entities -- not that the Commission should require lower prices for some or all such programmers. Where Congress determined that the public interest required free carriage, it mandated such carriage for must-carry broadcast signals. By definition, 47 U.S.C. §532 provides "cable channels for commercial use," and further subsidization of leased access would be inappropriate.

B. Mandatory Packaging Requirements Further Increase the Competitive Imbalance Faced by Other Programmers.

The Commission also proposes to require cable operators to carry all leased access channels on basic service or the "CPST with the highest subscriber penetration." Further Notice at ¶¶118-119. Such mandatory preferred packaging represents a complete reversal of the Commission's original decision² and further distorts any remaining competition among programmers. Clearly, other programming services must negotiate for carriage and packaging

² In considering the identical legislative history that leased access provide a "genuine outlet" for programming, the Commission concluded that packaging by regulation was inappropriate and would not achieve the required balance with the "legitimate needs of cable operators to market their programming:"

Thus, we believe that channel placement or tier access is a matter that is best left in the first instance to negotiation between the parties bearing in mind the nature of the service being offered, the relationship between the charge imposed and the desirability of the channel, and the congressionally mandated objectives that leased channels provide competition in the delivery of programming and afford programmers genuine outlets. Given the diversity of possible access uses, we do not believe it desirable at this time to attempt an a priori allocation scheme.

Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd. 5631 (1993), at ¶498 (notes omitted).

without the benefit of any government-imposed requirements. The provision of a “genuine outlet” for leased access programming does not require mandatory distribution to and subscription by virtually all subscribers. If the Commission were to require all cable operators to carry all leased access channels as proposed, thereby increasing the number of channels in such tiers, the rates for basic service or the most popular CPST would increase substantially. Such increases in the price of regulated tiers would have the natural effect of decreasing the discretionary spending available for premium services, such as those offered by Encore. Provided that there are no technical obstacles to receipt by subscribers, the creation of separate leased access tiers or offerings which subscribers could accept or reject provides a genuine outlet with which other programmers may still compete.

C. If the Commission Substantially Revises Leased Access, It Should Adopt Transition Rules to Minimize the Resulting Disruption to Other Programmers and Viewers.

In addition to these fundamental pricing and packaging issues, the Commission should consider a number of important transition issues if it adopts significant changes in the existing leased access rules. Subsidized leased access pricing is likely to require the deletion of a significant number of existing programming services from channels designated to leased access, resulting in decreased diversity and viewer dissatisfaction. Therefore, the mechanism for designating channels for deletion, the length of the transition period to the new rules, and minimization of such deletions for part-time leased access should be essential elements of any revised rules.

1. Flexible Deletion Designations.

The Commission's proposal would require cable operators to designate all channels to be deleted for the leased access set-aside and permit them to revise such selections only annually. Further Notice at ¶76. This mechanism is unnecessarily inflexible and does not provide programmers being dropped with an opportunity to negotiate with cable operators to forestall deletion. There is no reason to preclude such flexibility by permitting cable operators to revise their selections during the interim so long as any information required by the Commission is made available.

2. Implementation Transition Period

As set forth above, revisions to the leased access rules, as proposed by the Commission, are likely to cause the widespread deletion of existing programming. Therefore, Encore respectfully submits that the Commission should provide a multi-year transition period to any new leased access rules. Programmers cannot revise their business plans and overhead costs at will. For example, programming licensing commitments and costs often are incurred years in advance as programmers seek to obtain a sufficient supply of programming product based upon reasonable projections of future subscribership. Revised leased access rules that result in the deletion of existing programming services and a further decrease in any remaining channel capacity will necessarily impact such projections and potentially have drastic adverse effects on programmers.

3. Minimizing Deletions for Part-Time Carriage.

The Commission also tentatively concludes that "the guarantee of a minimum time increment of eight hours within a 24-hour period" would be a sufficient commitment to

require a cable operator “to remove an existing full-channel programmer.” Further Notice at ¶124. By requiring cable operators to lease channels in minimal time increments, the Commission has gone to great lengths to accommodate leased access programmers contrary to the normal practices of cable operators and programmers. However, this accommodation should not cause unnecessary deletions of existing programming for part-time leased access carriage. Replacing a twenty-four hour per day existing programming service with an eight hour block of leased access programming is an inefficient use of channel capacity causing subscriber dissatisfaction. Multiple channels should not be deleted to provide “comparable time slots” for minimal leased access commitments. If a leased access programmer seeks carriage on a channel which would require the deletion of an existing programmer, that leased access programmer should be responsible for the cost of leasing the full channel until additional leased access programmers request carriage on that channel.

Conclusion

The Commission’s proposal for leased access pricing would yield channel access at little or no cost, requiring cable operators, existing programmers, and subscribers to subsidize such access. A leased access give-away in the name of programming diversity would create just the opposite -- widespread deletion of existing programming services for carriage of services such as home shopping, infomercials, and broadcast services not entitled to must-carry. Mandatory carriage on basic or near-basic tiers would only exacerbate the competitive

³ There appears to be no statutory authorization or public interest justification for third-party resale of leased access time. Further Notice at ¶141. By requiring cable operators to lease channels in minimal time increments, the Commission has obviated any need for such resale. Third parties should not be permitted to profit from the resale of leased access at the expense of the diversity provided by existing programmers.

imbalance between leased access and other programmers. Encore respectfully requests that the Commission revise its proposal to incorporate realistic measures of the value of channel capacity, eliminate mandatory packaging requirements, and include a substantial transition period in order to minimize the inevitable disruption in the carriage of existing programming services.

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Respectfully submitted,

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